Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of NorthStar Alarm Services, LLC's Petition for Expedited Declaratory Ruling	)	
	)	CG Docket No. 02-278
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS OF NORTHSTAR ALARM SERVICES, LLC

NorthStar Alarm Services, LLC ("NorthStar"), by its counsel, submits these Reply Comments in support of its Petition for Expedited Declaratory Ruling Clarifying 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act (hereinafter, the "Petition"). The Petition seeks the Commission's ruling on whether soundboard technology is regulated as the use of an "artificial or prerecorded voice ***to deliver a message***" to a residential telephone line under the Telephone Consumer Protection Act ("TCPA" or the "Act"). Specifically the Petition asks the Commission to declare that:

1. The use of soundboard technology does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA; or, in the alternative,

2. The use of soundboard technology on a one-to-one basis, whereby the soundboard agent conducts only one call with one individual at a single time, does not constitute the use of an artificial or prerecorded voice that delivers a message under the TCPA.

Despite this narrow, direct purpose, the majority of the comments submitted in response to the Petition present radical, unworkable mischaracterizations and interpretations of the Act, the Petition, soundboard technology, and the Commission's power and responsibility. Because these assertions cannot go unanswered, NorthStar submits these Reply Comments.

I. The Responding Comments Have Created an Insurmountable and Unnecessary Constitutional Issue

NorthStar's Petition seeks a straightforward agency clarification: whether a particular type of technology—with which the agency has a recognized expertise—is regulated by one provision of the statute that the agency is tasked with enforcing. Rather than engage with the Petition's modest request, many of the commenters have chosen to take what should be a limited, narrow clarification—framed to address the specific one-call-at-a-time manner in which the soundboard technology was deployed during the residential landline calls that are the subject of the *Braver v. NorthStar Alarm Services, LLC* litigation pending in Oklahoma federal court—and expand it into a fevered attack on existing TCPA rules and guidance. These arguments are motivated by brazen animus toward telemarketing and an attempt to expand the TCPA to eliminate the use of soundboard technology and the practice of telemarketing altogether. The end result is a distortion of NorthStar's Petition and, even more troubling, a threat to the First Amendment.

When the TCPA first was enacted, affected businesses and organizations representing those businesses were concerned about whether the Act would infringe their First Amendment rights.[1] From these challenges developed case law[2] defining the relationship between the Act, which indisputably limits free speech, concerns about government regulation of speech, and the

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[1] *See, e.g.*, *Lysaght v. State of N.J.*, 837 F. Supp. 646, 648 (D.N.J. 1993); *Moser v. F.C.C.*, 811 F. Supp. 541, 542 (D. Or. 1992); *see also* President George W. Bush, Statement on Signing the Telephone Consumer Protection Act of 1991 (Dec. 20, 1991) ("This legislation is designed for the laudable purpose of protecting the privacy rights of telephone users. However, the Act could also lead to unnecessary regulation or curtailment of legitimate business activities. That is why the Administration opposed it when it was pending before the Congress. Indeed, the Administration is firmly opposed to current congressional efforts to re-regulate the telecommunications industry. I have signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices. These include automated calls to consumers with whom a business has preexisting business relationships, such as calls to notify consumers of the arrival of merchandise ordered from a catalog. I also understand that the Act gives the Commission flexibility to adapt its rules to changing market conditions. I fully expect that the Commission will use these authorities to ensure that the requirements of the Act are met at the least possible cost to the economy.").

[2] *See, e.g.*, *Moser v. F.C.C.*, 46 F.3d 970, 973 (9th Cir. 1995); *see also Gallion v. Charter Commc'ns Inc.*, 287 F. Supp. 3d 920, 931 (C.D. Cal. 2018) (citing cases).

privacy interests that, while crucial, are still subordinate to the First Amendment.[3] Court have determined repeatedly that the Act is subject to the highest form of constitutional scrutiny,[4] meaning that is must be "narrowly tailored" and the least-restrictive means available "to promote a compelling Government interest."[5]

The compelling government interest most frequently cited to defend the TCPA is privacy. Indeed, the commenters also refer to the privacy rights of call recipients. While protection of privacy is certainly an important interest, it does not warrant the blanket prohibitions suggested by the commenters. This line of argument—conflating "illegal" robocalls with any call which contains any recorded or artificial voice element[6]—is based on the erroneous assumption that all telemarketing is "bad" for consumers, and, therefore, any technology that facilitates outbound telephone marketing even when in furtherance of public interest considerations is equally "bad." Neither are true. Telemarketing is a vital business tool to reach consumers who want to purchase products and services. Soundboard technology provides benefits to these consumers by ensuring that the consumers receive consistent, accurate messages.

Several commenters point to situations in which the technology did not work as designed or where consumers were unhappy with the technology, and conclude that soundboard itself is

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3 *Martin v. City of Struthers*, 319 U.S. 141, 145-48 (1943).

4 *See, e.g.*, *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1034 (N.D. Cal. 2017); *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128, 1149 (D. Minn. 2017)

5 *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 804 (2000).

6 Taking the opposing comments to their extreme, a simple hold message played during a completely live operator, manually-dialed call to allow the operator, for example, to review account notes or speak with a supervisor, would constitute a prerecorded message and subject the caller to TCPA liability. Similarly, an individual who, like the late Stephen Hawking and many others, suffers from ALS or another neurological disease robbing them of their speech and, thus, relies exclusively on a voice generator to talk would be subject to liability for any conversation he or she has because such technology utilizes an "artificial voice" (even if the computerized voice employed recordings of the individual's own pre-disability "prerecorded" voice). Each of the above technologies unquestionably utilizes an "artificial or prerecorded voice" during an outbound call, but neither "delivers a message" of the type that the TCPA was designed to prohibit.

harmful and should be prohibited outright by the TCPA. (These concerns are not technology issues but, rather, implicate criticisms relating to poor customer service as these exact same "harms" would exist if a caller utilized his or her own voice in the exact same manner.) Putting aside that the commenters are conveniently ignoring the innumerable instances where soundboard has been employed without issue, their core argument cannot pass constitutional muster. The breadth of this line of argument is such that a prerecorded message informing recipients that the call may be monitored or recorded for quality control purposes would render the entire call subject to 227(b) of the Communications Act. Some states, such as California, require this disclosure at the outset of calls but others do not, and we are unaware of any claims that the inclusion of a quality control message in an otherwise live operator call renders the call subject to Section 227(b). That line of reasoning is not a narrowly tailored restriction. It is an impermissible attack on free speech. The specific type of technology conveying the information cannot obliterate the fundamental safeguards that the Supreme Court repeatedly has reinforced even in the face of citizen annoyance.[7]

II. The Commission Has the Authority and Technological Expertise to Determine the Issues in the Petition, not the FTC

Not surprisingly, many of the comments focus on a November 2016 letter from a Federal Trade Commission ("FTC") Staff attorney, in which she abruptly reversed course on soundboard technology.[8] The focus is misplaced. The Commission, not the FTC, is charged with applying

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[7] *Martin*, 319 U.S. at 145 ("While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion.").

[8] Previously, the FTC Staff's long-held position was that soundboard technology calls deployed in the exact manner used by the caller co-defendant in the *Braver* litigation were ***not*** prerecorded messages under the Telemarketing Sales Rule. Sept. 11, 2009 Letter from Lois Greisman, Assoc. Dir., Division of Marketing Practices, to Michael Bills, CEO, Call Assistant, LLC, at 2 (attached hereto as Exh. 1 for the record) ("You seek an opinion as to whether the amended TSR provisions on the use of prerecorded messages in telemarketing apply to . . . calls that employ the [soundboard] technology summarized above. Based on the description of the technology included in your letter, the staff of the [FTC] has concluded that the 2008 TSR amendments cited above do not prohibit telemarketing calls using this technology . . . ***Consequently, in Staff's view, the concerns about prerecorded messages addressed in the 2008 TSR amendments do not apply to the calls described above, in which a live human being continuously***

and interpreting the TCPA. The Commission, not the FTC, is also the recognized expert in communications technology like soundboard. And, while the agencies should coordinate, the FTC cannot extend its own authority into that of the Commission. This is the Commission's decision to make.

While these reasons alone are sufficient for the Commission to decide the issue apart from the FTC, to the extent the Commission is concerned about inter-agency cooperation, the FTC consistently taken the view that the November 2016 letter "is not a final agency action" but, instead, "an informal, tentative assessment of the law by a subordinate official" with "no authority to issue binding rules"; it is nothing more than a "staff opinion."[9] Indeed, in a recent brief to the Supreme Court, the FTC argued that the letter was not a final agency action because it was "an advisory opinion not from the [FTC], but from FTC staff"[10] and that "the [FTC] has not even spoken its ***first*** word on the matter, since the [FTC] has never opined on the applicability of the TSR's anti-robocall provision to soundboard technology."[11] It is not entirely clear why the FTC has distanced itself from its Staff; it may have done so because of the constitutional concerns raised herein or because the FTC recognizes that it lacks the requisite expertise to address this issue. And, the FTC has not submitted comments in response to NorthStar's Petition to elucidate its reasoning. Nonetheless, given that the FTC has disclaimed the importance of its own letter, the Commission should not defer to it either.

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interacts with the recipient of a call in a two-way conversation, but is permitted to respond by selecting recorded statements.") (emphasis added). Further, the calls at issue in *Braver* were placed exclusively while the 2009 letter represented the FTC Staff's views.

9 *Soundboard Ass'n v. FTC*, No. 1:17-cv-00150 (D.D.C.), FTC Opp'n to Application for Prel. Inj. (ECF 11), at 17.

10 Brief of Respondent in Opposition, *Soundboard Ass'n v. FTC*, No. 18-722 (S. Ct. Feb. 6, 2019), at 11.

11 *Id.* at 12 (emphasis in original).

III. The Text of the Statute Regulates Using an Artificial or Prerecorded Voice to Deliver "A Message"

A number of the comments claim that the text of the statute demonstrates that it regulates soundboard calls because the technology uses a "prerecorded voice." Those commenters notably ignore the most relevant text of the statute, which prohibits the use of a prerecorded voice "to deliver a message."[12] It is the latter portion of Section 227(b)(1)(B) that underlies NorthStar's Petition and that addresses the ill the Act sought to prevent, and which correspondingly exempts soundboard technology. It is not for this Commission and it is certainly not for the commenters to re-write the statute; at best, the arguments advanced by the National Consumer Law Center and the Consumer Advocacy and Protection Society should be presented to Congress.

As discussed in more detail in NorthStar's Petition and initial Comments, the prerecorded message limitations of the TCPA were enacted in response to a flood of calls with clear and notable characteristics: one continuous message, no opportunity to speak with a live operator, and no human intervention. For this reason, it makes sense that Congress would limit the Act's scope to calls in which an artificial or prerecorded voice delivered "a" single, continuous message. By contrast, soundboard calls have none of the offending characteristics—the most important deficit being that soundboard does not deliver "a" message. Rather, a soundboard call is a conversation, which necessarily consists of many messages that are not "delivered" in the common definition of the word—which implies sending information to a passive recipient[13]—but, instead, are chosen in response to the call recipient's specific reactions, responses, and questions. The core function of soundboard is to eliminate the exact complaints the TCPA was designed to address while still

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12 47 U.S.C. § 227(b)(1)(B).

13 *Deliver*, Merriam-Webster, https://www.merriam-webster.com/dictionary/delivered ("to take and hand over to or leave for another . . . to send, provide, or make accessible to someone electronically").

preserving businesses' ability to reach consumers. To interpret the TCPA to prohibit the technology would end that development and jettison the important balance between economic interests and individual privacy that was so crucial to the Act's enactment.[14]

IV. NorthStar's Petition is All the More Critical in the Face of Renewed Robocall Scrutiny

The Commission is, of course, aware that "robocalls" have received a great deal of publicity in recent weeks. The commenters point to various situations in which the technology appears to have failed to achieve its intended purpose[15] or was used unscrupulously. The criticisms of many of the practices described in these reports may well be valid. But the distinction between these activities and the goals of soundboard technology could not be starker. Unresponsive, unhelpful nuisance calls are the antithesis of soundboard technology. Soundboard technology seeks to connect consumers with correct, useful information in the most effective and efficient means possible. A blanket prohibition on soundboard technology, particularly when the technology is used on a one-to-one basis, is tantamount to holding that any call which contains recorded material is a robocall under Section 227(b)(1)(B) and cannot be reconciled with the language of the Act or the Constitution: such a decision is not be narrowly tailored and does not achieve a legitimate governmental purpose.

NorthStar respectfully requests that the Commission find that soundboard technology does

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[14] President George W. Bush, Statement on Signing the Telephone Consumer Protection Act of 1991 (Dec. 20, 1991) ("This legislation is designed for the laudable purpose of protecting the privacy rights of telephone users. However, the Act could also lead to unnecessary regulation or curtailment of legitimate business activities. . . . I have signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices. . . . I fully expect that the Commission will use these authorities to ensure that the requirements of the Act are met at the least possible cost to the economy.").

[15] The now-infamous "Samantha West" conversation cited by commenters first appeared in an article nearly ***six years*** ago. *See, e.g.*, Denver Nicks, *Robot Telemarketer Employer: Samantha West Is No Robot*, *Time* (Dec. 17, 2013), http://newsfeed.time.com/2013/12/17/robot-telemarketer-samantha-west/. As with any developing technology, soundboard technology has made significant advancements since that time, as have best practices in the soundboard industry.

not deliver a prerecorded message as defined by the TCPA, or in the alternative, that soundboard technology used on a one-to-one basis does not implicate the TCPA.

March 29, 2019

Respectfully Submitted,

NORTHSTAR ALARM SERVICES, LLC.

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EXHIBIT 1

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Federal Trade Commission
Division of Marketing Practices

September 11, 2009

Mr. Michael Bills, CEO
Call Assistant, LLC
1925 West Indiana Avenue
Salt Lake City, Utah 84104

Dear Mr. Bills:

You have requested an informal staff opinion as to the applicability to 2008 amendments to the Telemarketing Sales Rule ("TSR") to a particular technology used by CallAssistant, L.C. ("CallAssistant"). The amendments at issue impose new restrictions on the use of prerecorded messages in telemarketing. 16 C.F.R. § 310.4(b)(1)(v); 73 Fed. Reg. 15204 (Aug. 29, 2008). Specifically, these amendments require, as of December 1, 2008, that any outbound telemarketing call that delivers a prerecorded message include: (1) if the call could be answered in person by a consumer, an automated interactive voice and/or keypress-activated opt-out mechanism that the call recipient can use at any time during the message to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A); and (2) if the call could be answered by an answering machine or voicemail service, a toll-free telephone number that the call recipient can use to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A). Additionally, as of September 1, 2009, the amendments prohibit any outbound telemarketing call that delivers a prerecorded message unless the seller has obtained from the recipient of the call an express agreement, in writing, that evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of that seller and includes such person's telephone number and signature.

As described in your letter, CallAssistant uses technology that enables its calling agents to interact with the recipient of a call using his or her own voice or by substituting appropriate audio recording of a response. According to your letter, when used to place outbound telemarketing calls, this technology works as follows:

> A live agent using the System places a call to a consumer and hears the consumer greeting. In response to the greeting, the agent may elect to speak to the call recipient using his or her voice, or may press a button to play an appropriate recorded script segment. After the agent's response, the agent listens to the consumer customer's reply. After listening to the consumer's reply, the live agent again chooses whether to speak to the call recipient in his or her own voice, or another recording. At all times, even during the playing of any recorded segment, the agent retains the power to interrupt any recorded message to listen to the consumer and respond appropriately.

Furthermore, according to your description, "live agents hear every word spoken by the call recipient, and determine what is said" in response. A single agent always stays with a call from beginning to end.

You seek an opinion as to whether the amended TSR provisions on the use of prerecorded messages in telemarketing apply to CallAssistant's calls that employ the technology summarized above. Based on the description of the technology included in your letter, the staff of the Federal Trade Commission has concluded that the 2008 TSR amendments cited above do not prohibit telemarketing calls using this technology if the calls that otherwise comply with the TSR and other applicable law. The 2008 amendments at 16 C.F.R. § 310.4(b)(1)(v) prohibit calls that deliver a prerecorded message and do not allow interaction with call recipients in a manner virtually indistinguishable from calls conducted by live operators. Unlike the technology that you describe, the delivery of prerecorded messages in such calls does not involve a live agent who controls the content and continuity of what is said to respond to concerns, questions, comments – or demands – of the call recipient.

In adopting the 2008 TSR amendments, the Commission noted that the intrusion of a telemarketing call on a consumer's right to privacy "may be exacerbated immeasurably when there is no human being on the other end of the line." 73 Fed. Reg. at 51180. The Commission observed that special restrictions on prerecorded telemarketing messages were warranted because they "convert the telephone from an instrument for two-way conversations into a one-way device for transmitting advertisements." *Id.*[1] Consequently, in Staff's view, the concerns about prerecorded messages addressed in the 2008 TSR amendments do not apply to the calls described above, in which a live human being continuously interacts with the recipient of a call in a two-way conversation, but is permitted to respond by selecting recorded statements.

Nevertheless, the use of such technology in a campaign to induce the sales of goods or services, or charitable donations is "telemarketing" under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6106(4), and therefore must comply with the Rule's other requirements and prohibitions. In particular, the technology must connect an outbound telephone call to a live agent within two seconds of the call recipient's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv). The agents making calls using this technology must

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[1] In adopting the 2008 amendments, the Commission recognized that in the future prerecorded message might eliminate the objections that prompted the adoption of the these rules and justify exemptions permitting interactive prerecorded messages:

> [T]he Commission notes that it is aware that the technology used in making prerecorded messages interactive is rapidly evolving, and that affordable technological advances may eventually permit the widespread use of interactive messages that are essentially indistinguishable from conversing with a human being. Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemption from the provisions adopted here.

73 Fed. Reg. 51180 (Aug. 29, 2008).

disclose the purpose of the call, the identity of the seller, make other required disclosures, and comply with other TSR provisions preventing deceptive and abusive conduct. *Id.* §§ 310.3 and 310.4.

Please be advised that this opinion is based exclusively on all the information furnished in your request. This opinion applies only to the extent that actual company practices conform to the material submitted for review. Please be advised further that the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the opinions of the staff members charged with enforcement of the TSR.

Sincerely,

Lois Greisman
Associate Director
Division of Marketing Practices